Mr. Butterfield also relied on section 176 of the Criminal Procedure Code and it appears to me that *Bagu* v. *Emperor*, L.R. 52 Ind. App. 191 lends some support to this contention. But I think *Bagu's case* also supports the view that the two offences murder and concealment could have been the same transaction. The accused were charged under section 302, they were convicted under section 201 and the basis of the appeal was that no charge had been laid under 201—not that no charge could have been laid under that section. *Bagu's case* was, however, decided under sections 236 and 237 of the Indian Criminal Procedure Code, corresponding to sections 172 and 173 of the Colony Code.

I would venture to put it this way. Section 173, 174, 175, 176 and 179 must be considered together. Section 173 is the dominant section, the other sections state what is not within the mischief of section 173.

The mischief of section 173 is to prevent unfairness or embrassment to the accused (1) by confusion of issues, (2) by introduction of evidence tending to shew that he is guilty of some other offence.

If the offences are in the same transaction, neither of these embarrassments arise. The two offences in the present case have the relationship of cause and effect. If the appellant had only been charged with one evidence of the other would have been admissible as being relevant to the issue otherwise than by proving bad character and once that can be done and if confusion of issues does not arise, I think the charges are taken out of the mischief of section 173.

I think this relevance of the evidence of the other offence supplies the nexus or shews the relationship of cause and effect between the two offences and shews them to form part of the same transaction.

As this latter reason is perhaps not consistent with a passage in the Judgment in *Rex* v. *Tan Chu Chooi*, 7 M.L.J., 230, I prefer to rest my judgment on *Sanjiv Ratnappa* v. *Emperor*, *(supra)* in which it has been held that fabricating or destroying evidence was an offence in the same transaction as the offence which the second offence was intended to conceal.

In my opinion there was no misjoinder and the appeal is dismissed.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]

HOWES. J.

April 28. 1939.

REX v. YOON CHOON PAWNSHOP AND OTHERS.

[PENANG CRIMINAL APPEAL No. 35 of 1938]

Pawnbrokers Ordinance (Cap. 216), s. 27 —Delivery of property unlawfully pawned.

A firm of jewellers, I.B. Limited, employed K. as a salesman and they handed to him certain articles of jewellery to be sold by him on their behalf at certain prices stipulating that the property in the said goods was to remain in the company until the said prices were paid to the company. The salesman K. thereafter handed some of the articles to one Y. whom he had previously employed as a broker for purposes of sale and he took from Y. receipts in which the articles were stated as having been received from I.B. Limited, each receipt being marked "for approval." Y., while ostensibly agreeing to the trust which he secretly intended to disregard took the articles and at once pawned them with various pawnbrokers.

Held, that Y. was a mercantile agent and that he was acting in the ordinary course of business of a mercantile agent and accordingly he had power to sell the jewellery. That an agent who had been entrusted with the power of sale had also got the lesser power to pledge the articles and that therefore the pawnbrokers had good titles and that the jewellery should only be delivered to I.B. Limited on payment by them to the pawnbrokers of the amounts paid by the pawnbrokers to the pledger in each case.

CRIMINAL APPEAL.

R. D. Hume for pawnbrokers.

T. E. Conaghan for I. B. Limited.

Cur. Ad. Vult.

HOWES, J.—This is an appeal from an order made by the District Judge, Penang, ordering the return to Ipekdjian Brothers Ltd. of certain jewellery which had been pledged with the appellants.

The learned District Judge found that Messrs. Ipekdjian Brothers Ltd. were still the owners of the jewellery, and he consequently, after holding an inquiry under Section 435 of the Criminal Procedure Code (which deals with the disposal of property produced before the Court, regarding which an offence appears to have been committed), made an unconditional order for it to be returned to them, under Section 27 of the Pawnbrokers Ordinance.

The facts are very simple. Ipekdjian Brothers Ltd. employed one Khoo Sian Tat as a salesman (but who also acts as a broker for them) at 140A Malacca Street, Penang.

On 10th May 1938, as evidenced by Consignment Note No. 5 (Exhibit "G") Ipekdjian Brothers Ltd. handed to Khoo Sian Tat certain jewellery "to be sold by him at a price not less than the amount set out opposite each item of goods; and either such price of same or the goods are to be returned on demand by the Company, and the property in the said goods shall remain in the Company until the said price is paid to the Company." The District Judge found that Khoo Sian Tat was a mercantile agent.

Khoo Sian Tat gave certain of the articles to Yeoh Oon Chye (whom he had known for nearly 3 years, and who had acted for him as a broker on previous occasions in May 1938) for the purposes of sale, Yeoh Oon Chye having told him he had a buyer.

Khoo Sian Tat had no suspicion that there was anything wrong, and Yeoh Oon Chye gave him receipts (Exhibits F1—4) for the various articles, made out as having been "received from Ipekdjian Brothers Ltd." each receipt being marked "For approval" which I presume to be the equivalent of a sale "On approval." In fact Yeoh Oon Chye had no prospective buyer, but at once pawned the articles with the different appellants.

On the complaint of Khoo Sian Tat, Yeoh Oon Chye was charged under Section 420 of the Penal Code with having cheated Khoo Sian Tat by dishonestly inducing him to deliver the various articles, and upon his pleading guilty, was convicted of that offence.

Section 420 of the Penal Code is analogous to the English law of obtaining goods by false pretences, but is wider, in that, although under English law (62 & 63 Vic. c. 22 s. 3) a promise as to future conduct not intended to be kept is not by itself a false pretence, this, under the Code, will amount to cheating.

The intention of Khoo Sian Tat was clear. He delivered the articles to Yeoh Oon Chye as a broker or agent, intending not only that he should have possession, but should dispose of the property by sale. It is immaterial that Yeoh Oon Chye while ostensibly agreeing to the contract of agency, yet secretly intended to disregard it.

Any agent who has been entrusted with the power of sale, is given the lesser power of pledging.

Clearly, Yeoh Oon Chye had the right at any time to pay Khoo Sian Tat the amount he had received from the pawnbrokers plus the difference between that and the price at which he was authorized to sell the jewellery, and had he done so, then both the property as well as the possession of the goods would have passed to Yeoh Oon Chye, unless in the meantime, the contract of sale between him and Ipekdjian Brothers Ltd. made by their salesman Khoo Sian Tat had been avoided.

During the continuance of this contract, it follows that Yeoh Oon Chye was entitled to pledge the jewellery to an innocent third party for valuable consideration.

The articles were, with the consent of Khoo Sian Tat, in the possession of Yeoh Oon Chye and with the right to dispose of them; and although Yeoh Oon Chye obtained them by making false representations as to what he was going to do with them, Yeoh Oon Chye had a good title to the articles until the contract or the possession obtained by those representations is avoided, (see *London Jewellers Ltd.* v. *Attenborough*, (1934) 2 K.B. at p. 218 *per* Scrutton, L.J.).

The District Judge held that Yeoh Oon Chye in this transaction "was not acting as an agent at all."

With this finding, I am unable to agree.

Khoo Sian Tat admits that he gave the jewellery to Yeoh Oon Chye to act as a broker with the power to sell it, as he had done on previous occasions; so that Yeoh Oon Chye, as between himself and Khoo Sian Tat, was a mercantile agent. A mercantile agency under the Factors Act, 1889, may exist although the agent, as here, is acting for one principal only and has no general occupation as agent, (see *Lowther* v. *Harris*, (1927) 1 K.B. p. 393).

In the present appeal, I am not concerned with the relationship between Yeoh Oon Chye and Ipekdjian Brothers Ltd. I am considering the rights of the appellants, and whether the pledge was made by Yeoh Oon Chye "when acting in the ordinary course of business of a mercantile agent" within Section 2 (1) of the Factors Act.

In all the reported cases to which my attention has been called, the disposal of the goods was by a mercantile agent, to whom they had been directly entrusted by the true owner. The present case is, to some extent, complicated by the introduction of Yeoh Oon Chye (the pawner) as an agent of Khoo Sian Tat, the salesman employed by Ipekdjian Brothers Ltd.

What was the nature of the contract between Khoo Sian Tat as agent of Ipekdjian Brothers Ltd. and Yeoh Oon Chye? The only evidence as to this is the statement of Khoo Sian Tat, that he gave the articles to Yeoh Oon Chye "to act as a broker" (in other words to sell them) and the receipts (Exhibits F1—4) marked "For approval" and signed by Yeoh Oon Chye, and made out in favour of Ipekdjian Brothers Ltd.

This is similar to what was done in *London Jewellers Ltd.* v. *Attenborough*, (*supra*) where, with each article handed, presumably by a salesman to *Waller* (the pawner) was a debit note, showing the value of the article and bearing the words "On approval," which *Waller* signed.

In both that case and the present, the true "owner" was a limited company so they could

perforce only act and give consent in the conduct of their business through some officer or servant of the company.

Section 18 of the Sale of Goods Act 1893 begins by saying:

> "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer," and then Rule 4 says this:
> "When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms, the property therein passes to the buyer:—(a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction."

Substituting Yeoh Oon Chye for the man *Waller* in the above case, the goods were delivered to Yeoh Oon Chye on approval, with the consequence that the property would pass to him at some future time, that is, whenever he signified his approval or acceptance to the seller (Ipekdjian Brothers Ltd. in whose name the receipt was made out) or did any other act adopting the transaction. Such a contract leaves the seller in the hands of the buyer to a large extent, because the buyer has the opportunity behind the seller's back, of doing something which shows that he is adopting the transaction, and in *Kirkham* v. *Attenborough* (1897) 1 Q.B. 201, it was held that pledging is an act which adopts the transaction; so that the property in the goods passes to the buyer and the original vendor cannot recover them from the person with whom they have been pledged.

The questions in the present case are similar to those which arose in *Folkes* v. *King*, (1923) 1 K.B. 282, namely,

Firstly, whether Ipekdjian Brothers Ltd., through their salesman or agent, did intend to pass the property in the jewellery to Yeoh Oon Chye or to give him the necessary authority to pass the property in the jewellery to a purchaser.

In *Whitehorn* v. *Davison*, (1911) 1 K.B. at p. 479, a case in which the owner of an article was induced, by a false representation made by another that he had a customer, to deliver the article to that other, Buckley, L.J. stated:—

> "It seems to me that, where the owner of the goods intends to confer a power to pass the property, it is a case of obtaining goods by false pretences. It is, I think, obtaining goods by false pretences where the owner, being induced thereto by a trick, voluntarily parts with the possession, and either intends to pass the property, or intends to confer a power to pass the property. If he gives, and intends to give, that power, and the power is exercised, the person who takes under the execution of the power obtains the property, not against, but by the authority of, the original owner, and none the less because the authority was obtained by fraud."

Secondly, whether the appellants obtained a good title under the Factors Act.

This point was considered by Bankes, L.J., in *Folkes* v. *King*, (*supra*) at p. 297.

"Section 2 of the Factors Act provides protection in statutory form to persons who *bona fide* and without notice of any want of authority on the part of a mercantile agent have, amongst other things, purchased goods from the agent, he being in possession of the goods, with the consent of the owner. I can see no reason why rules and principles of the criminal law are to be introduced for the purpose of putting a construction upon the language of the section. What the section refers to is the consent of the owner. .....It is admitted that where possession of goods has been obtained by false pretences, or where a bailee has stolen them, a title by a bona fide purchaser can be made under the section."

In the present case, there can be no doubt that Ipekdjian Brothers Ltd., through their agent, Khoo Sian Tat, did consent within the meaning of Section 2 of the Factors Act, to Yeoh Oon Chye being in possession of the jewellery.

The words "acting in the ordinary course of business of a mercantile agent" were considered by the Court of Appeal in *Oppenheimer* v. *Attenborough*, (1908) 1 K.B. 221, and in the opinion of Lord Alverstone, C.J., at p. 227, mean, "that the person must act in the transaction as a mercantile agent would act if he were carrying out a transaction which he was authorized by his master to carry out. Then Mr. Rawlinson took the point that where a pledgee is told by the pledgor that the goods are his own that is to say where the pledgor does not purport to be agent for any one—(as in the present appeal) the pledgee gets no protection under the Act. I cannot think that it was intended to exclude from the protection given by the Act a case where a mercantile agent has possession of goods with the consent of the owner, and tells a lie to the pledgee in order to obtain an advance upon them. And this view is supported by implication. The preamble of the Factors Act, 1842, recites that it is expedient and necessary that owners entrusting agents with the possession of goods should be bound by any contract of pledge in like manner as they would

be bound by a contract of sale, that is, notwithstanding the pledgee has notice that the pledgor is an agent. It seems to me it would be very strange that the Legislature should intend to protect a transaction of pledge made by a person whom the pledgee knew to be an agent, but not one where the pledgor does not communicate his real position to the pledgee."

In my opinion, Yeoh Oon Chye was acting in the ordinary course of business of a mercantile agent—or at least there is no evidence that he was not. He certainly had power to sell the jewellery, but instead of doing so he pledged it.

The appeal must be allowed, and the order of the learned District Judge be set aside. I order that the jewellery be delivered to Messrs. Ipekdjian Brothers Ltd. on payment by them to the appellants of the amounts paid by the appellants to the pledgor in each case.

Appeal allowed.

END OF STRAITS SETTLEMENT OFFICIAL REPORTS.

F. M. S. REPORTS

[APPELLATE CRIMINAL JURISDICTION
MURRAY-AYNSLEY, J.
March 29, 1939.

WILSON v. PUBLIC PROSECUTOR

[PERAK MAGISTRATE'S CRIMINAL APPEAL
No. 9 of 1937]

Road Traffic Enactment (No. 17 of 1937) Sec. 25 (ii)—negligent driving—motor vehicle running off road—presumption of negligence—defence attributing accident to a 'skid'—whether presumption rebutted.

The appellant was charged under section 25 (ii) of the Road Traffic Enactment with driving a motor car on a road in a negligent manner by causing the car to run off the road. He was convicted and sentenced to a fine of $25/- and costs, or in default two weeks rigorous imprisonment. It was also ordered that his license be endorsed under Section 25 (3) of the Enactment. The prosecution could only prove that the vehicle had left the road and fallen into a ravine. The appellant who was the only person present at the time of the accident attributed it to a skid. The learned Magistrate on the evidence found that the marks shown on the road were those of the appellant's vehicle and came to the conclusion that the appellant was guilty of negligence. The appellant based his appeal on the following grounds, among others:—that the learned magistrate was wrong in admitting in evidence (1) a report made by the appellant (2) a sketch plan and (3) four photographs taken of the scene of the accident all of which documents were tendered by a witness for the prosecution. It was submitted on behalf of the appellant that this evidence was inadmissible because neither the person who received the report nor the person who took the photographs was called to testify as to its or their authenticity; because it had not been shown that the sketch plan was made by a person competent to make it. The appellate Judge accepted none of these contentions.

Held, that once the Magistrate is satisfied upon the materials before him that a case of negligence has been made out and that the accused has not produced evidence to rebut the presumption of negligence, an appellate Court ought not to interfere with his decision which is based on a finding of fact.

Held, further, that it was, in the present case, unnecessary to decide whether skidding might not, at the present time, itself be evidence of negligence.

MAGISTRATE'S CRIMINAL APPEAL.

The facts sufficiently appear from the headnote above.

Huntsman for the Appellant.

Brodie, Deputy Public Prosecutor, for the Respondent.

Cur. Ad. Vult.

MURRAY-AYNSLEY, J.—In this case the Appellant was driving a motor vehicle which left the road and fell into a ravine. There were no witnesses to the accident except the Appellant himself.

In the Magistrate's Court the Police could only show that the vehicle had left the road and produced evidence of marks, and asked the Court to infer that these were made by the vehicle in question. In these circumstances can the prosecution be said to have proved that the Appellant was guilty of negligent driving? The English cases (such as *Ellor* v. *Selfridge*, 46 T.L.R. 236) establish the proposition that where a motor vehicle leaves a road without explanation that fact is evidence of negligence, but they also indicate that where it is proved that a "skid" takes place the presumption of negligence no longer holds good (*Wing* v. *London General Omnibus Co.*, 1909, 2 K.B. 652).

In the present case the Appellant who was the only person present at the time of the accident alleged that it was due to a skid.

The highway appears to have been of reasonable width and with a good surface.

It appears to me once there was material on which the Court could find that there was negligence, that is a question of fact whether the Appellant had produced evidence to rebut this presumption. The Magistrate had before him the evidence of wheel marks, which he was entitled to assume were those of Appellant's vehicle and the evidence of Appellant himself. On this I think he was entitled to arrive at the conclusion that the Appellant was guilty of negligence.

I do not pass an opinion as to whether at the present time skidding may not be evidence of negligence.

I do not think that any of the other points raised even if they have any foundation would justify my interfering with the conviction.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]
MURRAY-AYNSLEY, J.
March 29, 1939.

INDUT BIN ISHAK v. PUBLIC PROSECUTOR

[PERAK MAGISTRATE'S CRIMINAL APPEAL
No. 25 of 1939]

Criminal Procedure Code (Cap. 6) S. 68 (b); Penal Code (Cap. 45) S. 411; Minor Offences Enactment (Cap. 46) S. 35—security for good behaviour from persons suspected of having no ostensible means of subsistence—dishonestly retaining stolen property—fraudulent possession of property—trial of proceedings under Criminal Procedure Code taken before those for substantive offences—irregularity.

Three separate charges (1) of having no ostensible means of subsistence (Section 68 (b) the Criminal Procedure Code) (2) of dishonestly retaining stolen property